Filed 12/21/09 P. v. Bryant CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Mono)

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL BRUCE BRYANT, Defendant and Appellant.	C061735 (Super. Ct. No. MFE83964)

On two separate occasions, defendant Michael Bryant vandalized the car of his ex-girlfriend (the victim). After the first vandalism incident, the victim obtained a restraining order against defendant, which he violated when he vandalized the victim's car for a second time. As a result, defendant was charged with two counts of felony vandalism and misdemeanor disobeying a court order.

Defendant waived his right to a jury trial and agreed to a bench trial. At trial, both the victim and another ex-girlfriend, S. F., testified about defendant's uncharged

misconduct. The court found defendant guilty of all charges and sentenced him to three years in prison.

On appeal, defendant claims his trial counsel was ineffective for failing to object to the victim's and S. F.'s testimony and information in the probation report regarding uncharged misconduct. We disagree and affirm the judgment.

FACTUAL BACKGROUND

The victim and defendant dated for approximately three months in the fall of 2006. After the relationship ended, defendant repeatedly came to the victim's house and place of work uninvited and unannounced.

In December 2006, during one of defendant's unannounced visits, the victim informed him she would be out of town for a few weeks visiting family. While the victim was gone, she received several snide and angry phone messages from defendant. The night before she returned home, her house burned down. The victim suspected defendant was responsible. There were two separate fires originating in the victim's two beds, but the fire department could not determine the cause of the fires. Due to the damage to her house, the victim moved into an apartment. After the fires, defendant stopped contacting the victim.

On July 3 and again on July 8, 2007, while driving her car, the victim saw defendant riding his bike. On both occasions defendant appeared to be angry, yelled at the victim, and called her a "bitch." On July 9, 2007, the victim parked her car in the parking lot of her apartment complex. The next morning she discovered scratches up and down both sides of the car. The

victim reported the incident to the police and informed them that she suspected defendant committed the vandalism. The victim obtained a restraining order against defendant on August 2, 2007.

On June 11, 2008, the victim went to Angel's Restaurant and sat at the bar. Through the reflection of the bar glass, the victim saw defendant standing behind her. She did not make eye contact with defendant and did not speak with him.

After 15 to 20 minutes in the restaurant, defendant left and went outside to the back parking lot. Two other witnesses were in the parking lot loading their children in their car. Both witnesses saw defendant reach into the passenger side of his truck and look around to see if anyone was watching him. Defendant went over to the victim's car, ducked down below the side of the car, and walked his hand along the passenger door, leaning into the car and applying pressure. After defendant drove away, the witnesses called the police. Investigation revealed a new scratch along the victim's passenger door.

Based on the July 9, 2007 and June 8, 2008 incidents, defendant was charged with two counts of felony vandalism and disobeying a court order, a misdemeanor.

Before trial, the prosecutor filed a motion in limine requesting that evidence of defendant's conduct toward another ex-girlfriend, S. F., be admitted to show defendant's mental state, common plan, and absence of mistake or accident. Before tentatively granting the People's motion, the court stated, "We had an earlier discussion in chambers. And we concluded with

. . . [the People's] filed motions in limine. I don't see in the file an [o]pposition of any sort or [r]esponse of any sort from [defendant's counsel]." Defense counsel responded he had not yet filed a response. Defense counsel did, however, offer to stipulate to the admission of a report that summarized S. F.'s testimony. The prosecutor thanked defense counsel for the offer, but indicated he still intended to call S. F. Defense counsel never filed a response to the motion in limine and S. F. testified at trial without further objection.

At trial, S. F. testified about her prior relationship with defendant and his acts of uncharged criminal conduct against her. S. F. and defendant dated on and off in 2003 and 2004. After the relationship ended, defendant called S. F. and showed up at her house and place of work uninvited and unannounced. During one of defendant's unannounced visits, he threatened to kill S. F., cut her up into little pieces, and spread her across the countryside. S. F. testified her car was keyed and, in total, she had 19 slashed tires. On each occasion, S. F. suspected defendant of the vandalism. S. F. obtained a permanent restraining order against defendant, but he continually violated it. S. F. estimated that defendant violated the restraining order on 100 occasions and testified that on every occasion she reported the incident to the police.

The victim also testified about her suspicions of defendant's uncharged criminal conduct. On direct examination and without objection, the victim testified she believed defendant was responsible for her house fires. On cross-

examination the victim admitted that even though the fire department's investigation was unable to determine the cause of the fires and even though defendant was not charged for arson, she still believed defendant was responsible. On redirect examination and after an overruled hearsay objection, the victim testified she believed defendant was responsible because right before the fires, her neighbor told her he saw defendant breaking in and out of her home through the garage.

In closing argument, defense counsel did not challenge the evidence on the second vandalism and disobeying a court order charges stemming from the June 11, 2008, incident because there were two eye witnesses to the crime. Instead, defense counsel emphasized there was reasonable doubt that defendant committed the July 9, 2007, vandalism.

When sentencing defendant to state prison, the trial court stated, "I, quite frankly, think [defendant] is better characterized as a serial stalker. . . . [¶] . . . [¶] I think he is a danger to women who have the misfortune to invite him into their lives."

DISCUSSION

I

Standard Of Review

"To prevail on a claim of ineffective assistance of counsel, a defendant '"must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice."'" (*People v. Maury* (2003) 30 Cal.4th 342, 389.) "[P]rejudice must be affirmatively proved;

the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" (*Ibid.*, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 694 [80 L.Ed.2d 674, 698].)

On appeal, defendant argues, "trial counsel was ineffective for failing to: object to: (1) the irrelevant and prejudicial allegations contained in the probation report and admitted at trial regarding [the victim]'s belief that appellant burned her house down, and (2) [S. F.]'s testimony regarding the uncharged misconduct." We disagree. We conclude that the failure of defendant's trial counsel to object did not fall below an objective standard of reasonableness. Because we conclude trial counsel's conduct was reasonable, we do not address whether defendant was prejudiced by counsel's failure to object. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1123.)

II

Defendant's Ineffective Assistance Of Counsel Claim For Failing To Object To The Probation Report And The Victim's Testimony Regarding Her House Fire Fails

Defendant argues, "counsel provided deficient representation because he failed to object to the irrelevant and inflammatory allegation by [the victim] that [defendant] started the fires at her home." Although evidence of the victim's belief that defendant started the fires at her home was inadmissible, there was a reasonable tactical reason why defense counsel did not

object. Because defense counsel's decision not to object was reasonable, defendant's ineffective assistance of counsel claim fails.

A

The Probation Report And The Victim's Testimony Regarding Her Belief That Defendant Was Responsible For Her House Fires Were Inadmissible

Although the victim understandably believed that defendant burned down her house, her belief was not admissible for the simple reason that the victim lacked personal knowledge of such facts. (See *People v. Collins* (1968) 68 Cal.2d 319, 328.) "'Personal knowledge' means 'a present recollection of an impression derived from the exercise of the witness' own senses.'" (2 Witkin, Cal. Evidence (4th ed. 2000) Witnesses, § 46, p. 297, italics omitted.) Here, the victim was out of town when her house burned down. Therefore, it is impossible for her to have personal knowledge through her own senses that defendant burned her house down.

B

Even Though The Evidence Was Inadmissible, There Was A Reasonable Tactical Reason For Defense Counsel Not To Object

"Generally, failure to make objections is a matter of trial tactics as to which we will not exercise judicial hindsight. [Citations.] '[C]ounsel's conduct should not be judged by appellate courts in the harsh light of hindsight . . . and except in rare cases, an appellate court should not attempt to second-guess trial counsel.' [Citations.] 'It is not

sufficient to allege merely that the attorney's tactics were poor, or that the case might have been handled more effectively. . . . Rather, the defendant must affirmatively show that the omissions of defense counsel involved a critical issue, and that the omissions cannot be explained on the basis of any knowledgeable *choice of tactics*.'" (*People v. Lanphear* (1980) 26 Cal.3d 814, 828-829, italics added.)

Here, there was a reasonable tactical basis for defense counsel not to object to the evidence of the house fires. On direct examination, the victim testified she believed defendant started the fires in her home. On cross-examination, however, trial counsel established that the victim held firmly to that belief despite the fact that the fire department was unable to determine the cause of the fires. One tactical decision could have been to allow the victim's testimony to show that, despite inconclusive evidence, she blamed defendant when something bad happened to her. Defense counsel could reasonably have been trying to convey to the court that the victim's testimony lacked persuasive force because she blamed defendant for her house fires without conclusive evidence, and now, at trial, she was blaming him for the vandalism to her car without conclusive evidence. Because there was an objectively reasonable basis for trial counsel's actions, defendant's argument fails.

III

Defendant's Ineffective Assistance Of Counsel Claim For Failing To Object To S. F.'s Testimony Fails

On appeal, defendant argues his trial counsel rendered ineffective assistance of counsel for failing to object to S. F.'s testimony about his uncharged misconduct. Defendant's argument fails for two reasons: (1) this claim does not appear to be a proper one for direct appeal since defense counsel may, in fact, have objected to the evidence off the record; and (2) to the extent defendant may claim it was ineffective assistance for defense counsel not to object on the record, that claims fails because any objection would have been futile.

A

Defense Counsel May Have Objected

Our review of the record suggests trial counsel *may have* objected to the evidence off the record. Before tentatively granting the People's motion to admit S. F.'s testimony, the trial judge referenced a discussion held in chambers regarding the motion. It is possible that during the discussion, defense counsel made an objection or stated his concern regarding the admissibility of S. F.'s testimony.

In this instance, a claim of ineffective assistance of counsel based on the failure to object is more effectively raised in a petition for a writ of habeas corpus than on direct appeal because in support of such a petition the defendant is not limited to the appellate record. On habeas, defendant can show whether his trial attorney *actually* failed to object during the

chamber's conference. Indeed, the need for such evidence makes this the sort of ineffective assistance of counsel claim that is better raised by means of a petition for writ of habeas corpus. (See *People v. Waidla* (2000) 22 Cal.4th 690, 744 [in some instances, a claim of ineffective assistance of counsel "must be raised, if at all, 'by petition for writ of habeas corpus' [citation], which is not limited to the record on appeal's four corners [citation], 'rather than [on] appeal' itself" [citation].)

B

Any Objection Would Have Been Futile

In any event, we conclude defendant's trial counsel was not ineffective for failing to object *on* the record, because any such objection would have been futile. Evidence Code[1] section 1101, subdivision (a) bars introduction of evidence of a person's character trait "when offered to prove his or her conduct on a specified occasion." But section 1101, subdivision (b) permits introduction of evidence "that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, . . .) other than his or her disposition to commit such an act."

---

[2] All further section references are to the Evidence Code.

Here, defendant was charged with two counts of vandalism and one count of disobeying a court order. Before trial, the People filed a motion in limine to admit evidence of defendant's uncharged criminal conduct against S. F. As a basis for their motion, the People explained that S. F.'s testimony showed defendant's intent, absence of mistake, and a common scheme or plan in the charged offenses. As part of their burden of proof for the charged offense, the People were required to show defendant's intent (that he *maliciously* vandalized the victim's car) and absence of mistake (that he *knowingly* disobeyed a court order). (Pen. Code, §§ 594, subd. (a), 273.6, subd. (a).) Because S. F.'s testimony fit squarely within the type of evidence allowed by section 1101, subdivision (b), any objection to her testimony would have been futile. (See *People v. Anderson* (2001) 25 Cal.4th 543, 587 ["Counsel is not required to proffer futile objections"]; *People v. Constancio* (1974) 42 Cal.App.3d 533, 546 ["It is not incumbent upon trial counsel to . . . undertake useless procedural challenges merely to create a record impregnable to assault for claimed inadequacy of counsel"].)

Defendant argues, however, "Although the prosecutor claimed that [S. F.]'s testimony was relevant to prove [defendant]'s intent, absence of mistake or accident, and that he engaged in a common plan or scheme . . . these issues were not seriously in

dispute,[2] and that in essence, the evidence was offered to prove identity." Defendant's argument explains that because the evidence of the uncharged and the charged misconduct was not sufficiently similar to prove identity, it was inadmissible. Thus, the trial attorney's failure to object to inadmissible evidence constituted ineffective assistance of counsel.[3]

In making this argument, defendant essentially asks this court to conclude two things: (1) that both the prosecutor and the trial court misrepresented the reasons for allowing S. F.'s testimony (i.e., that they were really using her testimony as evidence of defendant's identity and not one of their articulated reasons); and (2) that the uncharged and the charged conduct were not sufficiently similar to prove identity. Even if we reached these conclusions, which we decline to do, defendant's argument still fails. Assuming S. F.'s testimony was inadmissible to show identity, it was still admissible for other section 1101, subdivision (b) purposes (intent, common

---

[2] As explained above, these issues were elements of the charged offenses. Because defendant pled not guilty to the charges, those issues were in dispute.

[3] Throughout defendant's opening brief, he envelops his identity argument within the context of *count I*, the July 2007 vandalism. Presumably, defendant makes this argument because his trial counsel conceded that defendant committed the offenses in counts II and III. However, defendant's trial counsel did not make those concessions until *closing argument*. Therefore, during trial, the People were permitted, in fact required, to offer evidence tending to prove any of the three charged offenses -- including evidence of defendant's intent and absence of mistake.

scheme, common scheme). Because S. F.'s testimony was admissible on other grounds, defense counsel could have reasonably believed that an identity objection would have been futile.

Defendant argues that even if there were other section 1101, subdivision (b) purposes for allowing S. F.'s testimony, "counsel's failure to object on the grounds that . . . its prejudicial effect outweighed any probative value, constituted deficient representation." We disagree. Contrary to defendant's arguments, none of S. F.'s testimony was unduly prejudicial; therefore, any section 352 objection would have been futile.

Our Supreme Court recently held, "'"Prejudice" as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice. Unless the dangers of undue prejudice, confusion, or time consumption "'substantially outweigh'" the probative value of relevant evidence, a section 352 objection should fail. [Citation.] "'The "prejudice" referred to in Evidence Code section 352 applies to evidence which *uniquely tends to evoke an emotional bias against the defendant* as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]"

[Citation.] [¶] The prejudice that section 352 "'is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' [Citations.] 'Rather, the statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors. [Citation.]' [Citation.]" [Citation.] In other words, evidence should be excluded as unduly prejudicial *when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction.* In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an *illegitimate purpose*.'" (*People v. Doolin* (2009) 45 Cal.4th 390, 438-439, first italics original; remaining italics added.)

In short, the purpose of section 352 is to preclude an emotionally motivated panel of lay persons from misusing proper probative evidence for some other improper reason. Here, however, defendant's guilt was decided by a jurist not a jury. Unlike a jury, a judge has undergone years of legal education and practice. No doubt the trial judge was well aware of the admissible and inadmissible uses of S. F.'s testimony.[4] Therefore, defendant's argument fails.

---

[4] In defendant's argument that counsel's ineffective representation was prejudicial, he cites the following case

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

SCOTLAND, P. J.

NICHOLSON, J.

---

language, "judges are *better* able than juries to limit their consideration of evidence to the purposes for which it is admissible [citation] . . . we see no reason to hold that basic procedural and evidentiary rules designed to minimize the likelihood of unfairness to persons accused of a crime should be completely ignored in nonjury trials. [Citations.] Some types of evidence are so difficult to disregard completely [citations] or to consider for one purpose but ignore for another [citation]. . . . The hearing of evidence of this kind, by judges as well as by juries, should be restricted to the essential minimum." (*People v. Charles* (1967) 66 Cal.2d 330, 338-339, fn. 12.)

We do not dispute these legal principles. Without providing analysis, defendant asserts, however, that S. F.'s testimony was the type that is, "'so difficult to disregard completely (citations) or to consider for one purpose but ignore for another (citation).'" Defendant has failed to explain why *in this case,* S. F.'s testimony falls in that category. We conclude it does not.